## Zakaria bin Bintang & Anor v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS B-05–227 OF 2009 AND B-05–228 OF 2009
AZHAR MA'AH, ANANTHAM KASINATHERAND ABDUL AZIZ ABDUL RAHIM JJCA
14 MAY 2012

*Criminal Law — Dangerous Drugs Act 1952 — s 39B(1) — Trafficking 4,578g cannabis — Appeal against conviction and sentence — Accused offering to sell drugs to agent provocateur — Accused arrested in agent provocateur's car with bag containing drugs on accused's lap — Defence of innocent carrier devoid of knowledge of drugs — Whether failure to tender as evidence money used by agent provocateur to buy drugs fatal — Whether discrepancies in prosecution's witnesses' evidence fatal — Whether break in chain of evidence — Whether information given by informer to police hearsay and inadmissible — Whether trial judge erred in calling for defence based on direct evidence of trafficking but later convicting by invoking presumption in s 37(da) — Whether conviction safe*

*Evidence — Hearsay — Oral hearsay — Whether information given by informer to police hearsay and inadmissible*

*Evidence — Witness — Discrepancies in evidence — Test as to whether a discrepancy is acceptable or not*

SP3 (a Chief Inspector) had instructed SP4 (D/L/Kpl Norsilah) and SP5 (L/Kpl Elben) to act as agent provocateur. As instructed, SP5 used the second appellant's mobile phone number, obtained from a source, to call the second appellant and arrange for a meeting near Masjid Jamhuriyah, in Petaling Jaya. SP4 and SP5 were seated in their car when the appellants arrived and got into the back seat of the car. After discussions, the first appellant left the car and came back bringing with him a black bag containing the cannabis. Prior to that, SP5 had shown the second appellant a bundle of notes amounting to RM11,000 ('the flash roll') as requested by the second appellant. The first appellant unzipped the bag and took out a box from where he took out a compressed slab which the second appellant said was cannabis and showed it to SP5. At that point of time SP5 gave the pre-arranged signal to SP3. SP3 and his raiding party rushed towards the car and found the appellants seated at the back seat with the black bag on the first appellant's lap. Both appellants were in a state of fright. The appellants were charged together under s 39B(1) of the Dangerous Drugs Act 1952 ('DDA') read together with s 34 of the Penal Code

for trafficking of 4578g cannabis. The first appellant's defence was that of an innocent carrier devoid of any knowledge about the drugs in the black bag. The first appellant claimed that he was requested by one Abu whom he had met during prayers to hand over the black bag to his (Abu's) friend who was waiting in the car in front of the mosque as Abu was in hurry to go to hospital to visit his friend. The first appellant claimed that he was informed by Abu that the bag contained Gudang Garam cigarettes. The second appellant corroborated the first appellant's story. Both appellants were found guilty, convicted and sentenced to death by the High Court judge. Hence, these appeals by both appellants against conviction and sentence. It was contended for the first appellant that: (i) the 'flash roll' was never tendered in evidence; (ii) the there were discrepancies in the prosecution's witnesses' evidence; (iii) there was doubt as to the exhibits as the *borang serah barang-barang kes* was not signed by the investigating officer; (iv) the storekeeper was not called to testified as to when the exhibits were taken out from the store. It was contended for the second appellant that: (i) the learned judge had taken into consideration hearsay evidence by accepting the evidence of SP5 regarding the name Ridwan (the second appellant) and his contact number (016–6897072); (ii) the trial judge had called for the defence based on direct evidence of trafficking under s 2 but had convicted the appellants by invoking s 37(da) at the end of the defence case.

**Held**, dismissing the appeals and affirming the conviction and sentence:

(1) There were discrepancies in the prosecution's evidence as to the 'flash roll'. Discrepancies in testimonies of witnesses in any given case are something that is quite normal and acceptable within certain limits. The test as to whether a discrepancy is acceptable or not is laid down in *Andy bin Bagindah v Public Prosecutor* [2000] 3 MLJ 644. The discrepancies in the evidence as to the 'flash roll' were not material as to affect the core of the prosecution's case; *Wan Marzuki Wan Abdullah v Public Prosecutor* [2008] MLJU 285 referred (see paras 26, 28).

(2) Though there were discrepancies in the evidence of SP3–SP6, they were not inherently improbable (see para 30).

(3) There was no break in the chain of evidence as to the exhibits. The evidence of SP6 had put beyond any doubt that the exhibits particularly the impugned drugs seized at the scene of the crime were the same drugs that were sent to the chemist for analysis and subsequently produced in court. Further though the storekeeper, was not called by the prosecution to testify, he was offered to the defence as a witness by the prosecution. However neither appellant took up the offer and called the storekeeper to testify; *Su Ah Ping v Public Prosecutor* [1980] 1 MLJ 75 referred; *Public*

*Prosecutor v Poh Ah Kwang* [2003] MLJU 186, 142 and *Teoh Hoe Chye v Public Prosecutor*; *Yeap Teong Jean v Public Prosecutor* [1987] 1 MLJ 220 distinguished (see para 36).

(4) The issue in relation to whether there is a break in the chain of evidence in any given case is not whether there was a failure to call or not to call a witness but whether the failure to call a particular witness gives rise to a serious gap in the prosecution's case; *Abdul Jalil bin Abdul Satar v Public Prosecutor* [1991] 2 MLJ 194 (SC) (see para 37).

(5) What was told to SP5 by his source was not hearsay. It was just information given by one party to another. The court may receive it just as that. In any event the telephone number and name given to SP5 were not used to identify the second appellant. The second appellant was identified personally by SP3 and SP5 when the second appellant was in the car. The negotiation was not conducted over the phone using the said phone number. It was conducted in the car. The first and second appellants had approached the car only after the phone call by SP5. There was no mistake as to the identity of the second appellant (see paras 40–41).

(6) The trial judge may rely on direct evidence of trafficking adduced before him and in the alternative may also invoke the presumption of trafficking if the evidence warrants it in calling for the appellants to enter their defence. The appellants had the opportunity to meet all the evidence adduced by the prosecution either direct evidence of trafficking or the evidence that triggered the presumption under s 37(da) of DDA when they were called to make their defence. Hence, the appellants were not prejudiced or put in a situation of tactical disadvantage; *Public Prosecutor v Sa'ari bin Jusoh* [2007] 2 MLJ 409 followed (see paras 46–47).

(7) The transaction in this case was one of 'selling' within the definition of 'trafficking' under s 2 of the DDA (see para 54).

**[Bahasa Malaysia summary**

SP3 (seorang Ketua Inspektor) telah mengarahkan SP4 (/L/Kpl Norsilah) dan SP5 (L/Kpl Elben) untuk bertindak sebagai ejen perangkap. Sebagaimana diarahkan, SP5 menggunakan nombor telefon bimbit perayu, yang diperoleh daripada sumber, untuk memanggil perayu kedua dan mengatur mesyuarat dekat Masjid Jamhuriyah, di Petaling Jaya. S4 dan SP5 sedang duduk dalam kereta mereka apabila perayu-perayu tiba dan masuk duduk di bahagian belakang kereta tersebut. Setelah berbincang, perayu pertama menginggalkan kereta itu dan datang balik dengan membawa dengannya beg hitam mengamdungi kanabis. Sebelum itu, SP5 telah menunjukkan kepada perayu kedua ikatan nota wang berjumlah RM11,000 ('flash roll') sebagaimana diminta oleh perayu kedua. Perayu pertama telah membuka zip beg itu dan mengeluarkan sebuah kotak dari mana dia mengeluarkan kepingan mampat

yang mana perayu kedua mengatakan adalah kanabis dan menunjukkan kepada SP5. Pada saat ini SP5 memberi isyarat yang telah dirancang terdahulu kepada SP3. SP3 dan pasukan serbuannya meluru ke kereta tersebut dan mendapati perayu-perayu duduk di bahagian belakang dengan beg hitam atas peha perayu pertama. Kedua-dua perayu berada dalam ketakutan. Perayu-peryu telah dituduh bersama di bawah s 39B(1) Akta Dadah Berbahaya 1952 ('ADB') dibaca bersama s 34 Kanun Keseksaan kerana mengedar kanabis seberat 4578g. Pembelaan perayu pertama adalah sebagai pembawa yang tidak bersalah tanpa apa-apa pengetahuan tentang dadah dalam beg hitam tersebut. Perayu pertama mendakwa bahawa dia diminta oleh seorang bernama Abu yang ditemuinya semasa solat untuk menyerahkan beg hitam tersebut kepada kawannya (kawan Abu) yang sedang menunggu dalam kereta di hadapan masjid kerana Abu tergesa-gesa ke hospital untuk melawat seorang kawan. Perayu pertama mendakwa bahawa di diberitahu oleh Abu yang beg tersebut mengandungi rokok Gudang Garam. Perayu kedua menyokong cerita perayu pertama. Kedua-dua perayu didapati bersalah, disabit dan dihukum mati oleh hakim Mahkamah Tinggi. Justeru itu, rayuan-rayuan oleh kedua-dua perayu terhadap sabitan dan hukuman tersebut. Adalah dihujahkan bagi pihak perayu pertama bahawa: (i) 'flash roll' itu tidak dimasukkan sebagai keterangan; (ii) terdapat percanggahan dalam keterangan saksi-saksi pendakwaan; (iii) terdapat keraguan berhubung ekshibit-ekshibit kerana borang serah barang-barang kes tidak ditandatangani oleh pegawai siasatan; (iv) penjaga stor tidak dipanggil untuk memberi keterangan berhubung bila ekshibit-ekshibit tersebut dikeluarkan daripada stor. Adalah dihujahkan bagi pihak perayu kedua bahawa: (i) hakim bijaksana telah mengambil kira keterangan dengar cakap dengan menerima keterangan SP5 berhubung nama Ridwan (perayu kedua) dan nombor telefonnya (016–6897072); (ii) hakim perbicaraan telah memanggil pembelaan berdasarkan keterangan secara langsung pengedaran di bawah s 2 tetapi telah mensabitkan perayu-perayu dengan menggunakan s 37(da) di akhir kes pembelaan.

**Diputuskan**, menolak rayuan-rayuan dan mengesahkan sabitan dan hukuman:

(1) Terdapat percanggahan dalam keterangan pendakwaan berhubung 'flash roll' tersebut. Percanggahan dalam keterangan saksi-saksi dalam apa-apa kes adalah suatu yang biasa dan diterima dalam had tertentu. Ujian adalah sama ada percanggahan tersebut boleh diterima atau tidak dihuhajakan dalam kes *Andy Baginda v Public Prosecutor* [2000] MLJ 644. Percanggahan dalan keterangan berhubung 'flash roll' tersebut tidak penting sehingga menjejaskan kes pendakwaan; *Wan Marzuki Wan Abdullah v Public Prosecutor* [2008] MLJU 285 dirujuk (lihat perenggan 26, 28).

(2) Walaupun terdapat percanggahan dalam keterangan SP3–SP6, ia bukan suatu yang tidak berkemungkinan (lihat perenggan 30).

(3) Rntaian keterangan tidak terputus berkenaan ekshibit-ekshibit tersebut. Keterangan SP6 telah melenyapkan apa-apa keraguan bahawa ekshibit-ekshibit tersebut khususnya dadah yang dipersoalkan yang telah dirampas di tempat kejadian jenayah adalah merupakan dadah yang sama yang telah dihantar ke makmal kimia untuk dianalisis dan selanjutnya dikemukakan dalam mahkamah. Bahkan meskipun penjaga stor tidak dipanggil oleh pendakwaan untuk member keterangan, dia telah ditawarkan kepada pembelaan sebagai saksi oleh pendakwaan. Walau bagaimanapun perayu tidak mengambil tawaran itu mahupun memanggil penjaga stor itu untuk member keterangan; *Su Ah Ping v Public Prosecutor* [1980] 1 MLJ 75 dirujuk; *Public Prosecutor v Poh Ah Kwang* [2003] MLJU 186, 142 dan *Teoh Hoe Chye v Public Prosecutor; Yeap Teong Jean v Public Prosecutor* [1987] 1 MLJ 220 dibeza (lihat perenggan 36).

(4) Isu berkaitan sama ada rantaian keterangan terputus dalam apa kespun bukan sama ada terdapat kegagalan untuk memanggil atau tidak memanggil saksi tetapi sama ada kegagalan memanggil saksi tertentu mewujudkan lompang serius dalam kes pendakwaan; *Abdul Jalil bin Abdul Satar v Public Prosecutor* [1991] 2 MLJ 194 (MA) (lihat perenggan 37).

(5) Apa yang diberitahu kepada SP5 oleh sumbernya bukan dengar cakap. Ia hanya maklumat yang diberikan oleh satu pihak kepada satu pihak lain. Mahkamah mungkin menerimanya begitu sahaja. Dalam apa keadaan nombor telefon dan nama yang diberikan kepada SP5 tidak digunakan untuk mengenal pasti perayu kedua. Perayu kedua telah dikenal pasti secara peribadi oleh SP3 dan SP5 apabila perayu kedua berada dalam kereta. Rundingan tidak dilakukan melalui telefon menggunakan nombor telefon tersebut. Ia telah dilakuakan dalam kereta. Perayu-perayu pertama dan kedua telah datang ke kereta tersebut hanya selepas menerima panggilan telefon oleh SP5. Tiada kesilapan berhubung identiti perayu kedua (lihat perenggan 40–41).

(6) Hakim perbicaraan boleh bergantung kepada keterangan langsung pengedaran yang dikemukakan di hadapan beliau dan secara alternatif boleh juga menggunakan andaian pengedaran jika keterangan mewajarkannya memanggil perayu-perayu untuk memasukkan pembelaan mereka. Perayu-perayu berpeluang memenuhi semua keterangan yang dikemukakan oleh pendakwaan sama ada secara keterangan langsung pengedaran atau keterangan yang timbul daripada andaian di bawah s 37(da) ADB apabila mereka dipanggil membuat pembelaan mereka. Justeru itu, perayu-perayu tidak diprejudiskan atau diletakkan dalam keadaan yang kelemahan taktikal; *Public Prosecutor v Sa'ari bin Jusoh* [2007] 2 MLJ 409 diikut (lihat perenggan 46–47).

(7) Transaksi dalam kes ini adalah 'selling' dalam definisi 'trafficking' di bawah s 2 ADB (lihat perenggan 54).]

**Notes**

For cases on discrepancy in evidence, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3099–3106.

For cases on oral hearsay, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1923–1925.

For cases on s 39B(1), see 4 Mallal's Digest (4th Ed, 2010 Reissue) paras 431–444.

**Cases referred to**

*Abdul Jalil bin Abdul Satar v PP* [1991] 2 MLJ 194; [1991] 2 CLJ 1099, SC (refd)

*Adzhaar bin Ahmad & Anor v PP* [1996] 4 MLJ 85, HC (refd)

*Andy bin Bagindah v PP* [2000] 3 MLJ 644; [2000] 3 CLJ 289, CA (refd)

*Ong Ah Chuan v PP; Koh Chai Cheng v PP* [1981] 1 MLJ 64, PC (refd)

*Looi Kow Chai & Anor v PP* [2003] 2 MLJ 65; [2003] 1 CLJ 734, CA (refd)

*Mat v PP* [1963] MLJ 263 (refd)

*Parlan bin Dadeh v PP* [2008] 6 MLJ 19, FC (refd)

*PP v Mohamed Ali* [1962] MLJ 257 (refd)

*PP v Poh Ah Kwang* [2003] MLJU 186, 142; [2003] 2 CLJ 722 (distd)

*PP v Sa'ari bin Jusoh* [2007] 2 MLJ 409; [2007] 2 CLJ 197, FC (folld)

*Su Ah Ping v PP* [1980] 1 MLJ 75, FC (refd)

*Teoh Hoe Chye v PP; Yeap Teong Jean v PP* [1987] 1 MLJ 220; [1987] 1 CLJ 471, SC (distd)

*Wan Marzuki Wan Abdullah v PP* [2008] MLJU 285; [2008] 4 CLJ 631, CA (refd)

**Legislation referred to**

Criminal Procedure Code s 180

Dangerous Drugs Act 1952 ss 2, 3, 37(da), 39B(1), (1)(a)

Misuse of Drugs Act 1973 [SG] ss 2(a), 3(a)

Penal Code s 34

**Appeal from:** Criminal Suit No 45–19 of 2006 (High Court, Shah Alam)

*Harpal Singh Grewal (K Pasupathy and Reny Rao with him) (A J Ariffin Yeo & Harpal) for the first appellant.*

*Mak Kah Keong (Gooi & Azura) for the second appellant.*

*Azlina bt Rasdi (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.*

**Abdul Aziz Abdul Rahim JCA:**

**[1]** These are the appeals by the appellant in Appeal No B-05–227 of 2009 ('the first appellant'); and by the appellant in Appeal No B-05–228 of 2009 ('the second appellant'), against sentence and conviction.

**[2]** Both the appellants were charged together under s 39B(1) of the Dangerous Drugs Act 1952 ('DDA') read together with s 34 of the Penal Code for trafficking of 4578g cannabis in front of Masjid Jamhuriyah, Jalan 7, Taman Dato Harun in the district of Petaling in Selangor. Both appellants were found guilty and upon conviction by the learned trial judge of the High Court at Shah Alam, both were sentenced to death by hanging as provided by law. Hence, both appeals were heard together.

THE BRIEF FACTS OF THE CASE

**[3]** On 17 May 2005, at 8.45pm, after a week of planning and a briefing, SP3 (Chief Inspector Ahmad Termizi Omar) stationed his raiding party opposite Masjid Jamhuriyah. In the planned raid, SP3 instructed SP4 (D/L/Kpl Norsilah bt Abdul Jalil) and SP5 (L/Kpl Elben @ Mohd Eyzairey bin Laleh) to act as agent provocateur. As instructed, SP4 and SP5 were seated in a Proton Waja bearing Registration No WML 4579 which was parked at the point marked X in the sketch plan exh P16. Meanwhile SP3 and one Kpl Che Ghazali was in another car, about 15 meters away, at point Y in exh 16 and facing car No WML 4579; and had a frontal and unobstructed view of both SP4–SP5 and the car WML 4579. The place was well lit with streets lights, stall lights and the lights from the mosque.

**[4]** SP5 was instructed to flicker the car's headlights several times signaling the raiding party headed by SP3 that the suspect was in the car together with the incriminating drugs. SP5 was given the second appellant's mobile phone No 016–6897072 obtained from his source. Using the phone number, SP5 called the second appellant on his mobile phone and was told to wait as the second appellant would be arriving shortly. During this phone conversation purportedly between SP5 and the second appellant, SP4 testified that she heard SP5 mentioned 'Abang Wan' and when they arrived at the front of Masjid Jumhuriyah, SP4 heard SP5 said into the phone 'Abang Wan saya sudah sampai di hadapan Masjid Jumhuriyah'. A short while later two persons, whom SP5 identified in court as the first and second appellant arrived and opened the back door of the car WML 4597 and sat at the back seat of the car. The first and second appellant introduced themselves to SP5.

**[5]** In the car, the second appellant informed SP5 that the cannabis was at some other place and the transaction was to be carried out elsewhere.

**[6]** However at the insistence and under the threat of cancellation of the transaction by SP5, the first appellant got out the car and left and came back bringing with him a black bag that was said to contain cannabis.

**[7]** Prior to this, SP5 had shown the second appellant a bundle of notes amounting to RM11,000 ('the flash roll') as requested by the second appellant. When the first appellant arrived with the black bag, SP5 requested to see the cannabis. The first appellant unzipped the bag and took out a box from where he took out a compressed slab which the second appellant said was cannabis and showed it to SP5. Thereafter the first appellant put back the compressed slab in the box put it back into the bag.

**[8]** At that point of time SP5 gave the pre-arranged signal to SP3 who was seated in the other car by flickering the headlights of his car several times signaling that the suspects were in the car with the incriminating drugs.

**[9]** On seeing the pre-arranged signal, SP3 and his raiding party rushed towards and converged at SP5's Proton Waja and SP3's car proceeded to and stopped in front of SP5's car. SP3 got out of his car and rushed towards the back door of SP5's Proton Waja and upon opening it he saw the first and second appellants seated at the back seat of the car with a black bag on the first appellant's lap and both of them were in the state of fright.

**[10]** SP3 conducted a search on the bag and found five compressed slabs of cannabis wrapped in aluminum foil and reinforced with plastic wrappings (exhs P11A–P15A).

**[11]** The first and second appellants were then brought to police station together with the five compressed slabs of the cannabis. The five compressed slabs of suspected cannabis were later sent to SP2 the chemist by SP6 on 18 May 2005. The chemist conducted the analysis on the substance and confirmed that the five compressed slabs were cannabis with a total net weight of 4,587g. Accordingly, the two appellants were brought to the court at Shah Alam and charged with the above charged.

## THE FINDINGS OF THE HIGH COURT

**[12]** At the end of the prosecution's case the learned trial judge wrote in his judgment as follows:

Upon conducting a maximum evaluation of the prosecution's evidence and in particular to the evidence of SP2–SP5 I am satisfied that the transaction is one of 'selling' within the definition of trafficking under s 2 of the DDA for the following reasons. SP5 conducted the purchase transaction with the second accused through mobile phone communication and the physical contact with both accused in his motor car WML 4579 on the night of 17 May 2005 in front of the Masjid Jamhuriyah. The mobile phone number of the second accused (016–6897072) was given to SP5 by his informer and the venue and purchase of 5 kilos of cannabis at RM2,200 per kilo was agreed upon through the telephone. Upon arriving at the agreed venue in front of the Masjid Jamhuriyah SP5 contacted 'Abang Wan' through his mobile phone and informed him of his arrival. A short while later the second accused together with the first accused arrived and opened the back door and set at the back seat. In the car both the accused introduced themselves and after informing SP5 that the cannabis was available directed the first accused to fetch the cannabis. Whilst waiting for the cannabis SP5 at the request showed him a flash role of RM11,000. The first accused showed SP5 the cannabis in the black bag he brought with him when he went to fetch the cannabis as directed by the second accused.

I am satisfied that the second accused was Abang Wan that SP5 spoke to over the mobile phone and this is discernable from the fact that the second accused went into the car and identified himself and the evidence of the investigating officer SP6 who made a call to mobile phone number 016–6897072 and the call came through one of the two mobile phones seized.

The sequence of events in the motor car which was corroborated by SP4 to my mind establishes a concluded transaction of sale since the subject matter namely the 5 kilos of cannabis and the consideration of RM2,200 per kilo for the purchase in the form of the flash role was present.

**[13]** The learned trial judge also found on the evidence of SP3–SP5 that the prosecution had proved actual possession of the cannabis by the first and second appellants. On this issue the learned trial judge wrote at pp 177–178 of his judgment as follows:

Alternatively it is my finding that the prosecution has proved actual possession and the application of the presumptive provision of trafficking under s 37(da) of the DDA. It is trite that for possession to be proved the prosecution must not only adduce evidence of the physical element of custody and control and also the mental element of knowledge — the absence of either one negates possession known to law.

The physical element of custody and control and the mental element of knowledge is discernable from the evidence of SP4 who testified that she heard the second accused telling SP5 that he had instructed the first accused to bring the cannabis. This piece of evidence shows that the second accused not only has custody but also knowledge of the cannabis that is to be brought by the first accused. The supporting evidence of custody, control and knowledge is reinforced by the evidence of SP3 who saw the first accused carrying the black bag (P18) and entering the back seat of SP5's car and the eye witness evidence of SP4 who saw the first accused placing the black bag (P18) on his lap and taking out the compressed slab from a box in the black bag (P18) and showing it to SP5. Whilst the first accused was showing the

compressed slab to SP5, SP4 heard the second accused informing SP5 'ini adalah ganja yang kamu pesan'. Thereupon the first accused placed the compressed slab back into the black bag (P18). The cannabis which was the subject matter of the charge herein was contained in the box (P8) found in the black bag (P18). The element of common intention has been established through the combined evidence of SP3, SPA and SP5 on the events transpiring in motor car WML 4579 in front of the Masjid Jamhuriyah as narrated above. The prosecution's evidence prima facie established that both the accused acted in concert in that the cannabis was brought into the car by the first accused upon the instructions of the second accused. The cumulative effect of the evidence aforesaid to my mind establishes actual possession by both accused and by reason of the weight of the cannabis exceeding 200g the presumptive provision of trafficking under s 37(da) is activated against both the accused. In arriving at my conclusion aforesaid I have taken into consideration the challenge made by the defence on the prosecution's failure to establish a sale transaction; inconsistencies of the prosecution's witnesses on the flash role; the reference of 'Abang Wan' as the second accused; no identification of the two handphones marked P20–P21 as belonging to which accused break in the chain of evidence and the credibility issue of the prosecution's witnesses.

The challenge aforesaid to my mind does not negative the prosecution's prima facie case at the close of the prosecution's case.

**[14]** The learned judge also found the inconsistency of evidence of SP3, SP4 and SP5 not material and that the evidence of these witnesses are credible.

**[15]** On those findings the learned judge called both appellants to enter their defence on the charge under s 39B(1) of the DDA 1952.

THE DEFENCE'S CASE

**[16]** The first appellant's defence is that of an innocent carrier devoid of any knowledge about the drugs in the black bag (exh P18). The first appellant's story is as follows:

(a) on the date of incident, after prayer he was requested by one Abu to hand over a black bag to his (Abu's) friend who was waiting in the Proton Waja, in front of the mosque; as he (ie Abu) was in hurry to go to hospital to visit his friend; and

(b) the first appellant was informed by Abu that the bag contained Gudang Garam cigarettes. Therefore, he (the first appellant) carried the bag without suspecting anything.

This conduct of the first appellant was described by his learned counsel as one of 'willful blindness'.

**[17]** The second appellant's defence is one of a denial. The second appellant in his defence practically said that he had nothing to do with the black bag and

its content. In his testimony given on oath, the second appellant said as follows:

(a) after performing prayer, he met with the first appellant. Then came a stranger (whom the appellant in their defence referred to as 'Abu') and the stranger chit chatted with the first appellant. He could not hear the conversation between them. He was 3 meters away from them;

(b) later, the second appellant said he saw the first accused's friend handed a bag to the first accused. The first accused then walked towards him carrying the bag. The first accused asked him to follow the first accused. When they reached at a Proton Waja, they were raided and the bag was seized, and the content was shown to the first accused; and

(c) the second accused defence was that he had nothing to do with the bag and its content.

**[18]** Having considered the defence case, and having undertaken the maximum evaluation of the evidence adduced by the prosecution and the defence, the learned trial judge concluded that the defence raised by both appellants has failed, on balance of probability, to create a reasonable doubt in the prosecution's case. Accordingly, the trial judge found both the first and second appellant guilty as charged and on conviction sentenced each of the appellant with the only sentence provided by the law for such offence that is the sentence of death by hanging.

**[19]** In arriving at that decision the learned trial judge, in his written judgment, reasoned as follows: The issue of Abu was never pursued nor mentioned during the prosecution's case and no challenge as to the conversation between SP5 and the accused of any mention Abu in the negotiation, therefore Abu is never a character involved in the transaction.

**[20]** Even if Abu existed, the appellants' defence tantamount to them being framed-up; and on evaluation of evidence no reason for the frame-up to be committed by Abu against them as there is no evidence of animosity between Abu and both the appellants.

**[21]** The conduct and reaction of both the appellants warrant a reasonable explanation by both of them (*Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19). In this case, the appellants gave no reasonable explanation to rebut that they had knowledge of the cannabis and the applicability of s 37(da) of the DDA.

**[22]** Both appellants' testimony reveals serious discrepancies in the appellants' version as compared to the testimonies of SP3–SP5.

**[23]** Both the accused failed on the balance of probabilities to raise any reasonable doubt.

THESE APPEALS

**[24]** In the appeal before us, the first appellant raised only three issues. The first issue is with regard to the selling transaction in the car Proton Waja between SP5 and the appellants. It was submitted by learned counsel for the first appellant in his written submissions and also orally that there are fatal and serious discrepancies with regard to the exhibits in the prosecution's case. In particular, it was submitted that the 'flash roll' that was purportedly used in this case was never tendered in evidence when it is obvious from the testimonies of the prosecution's witnesses that the 'flash roll' was indeed used. SP5 in his evidence said that he kept the 'flash roll' in his trouser's pocket and showed it to the second appellant when the latter wanted to see the money. SP5 also testified that the 'flash roll mengandungi wang tunai asal dan wang fotostet'. However SP4 who was in the Proton Waja with SP5 testified that 'wang flash roll dipegang oleh L/Kpl Elben (SP5) — saya nampak flash roll semasa L/Kpl Elben menunjukkannya kepada Wan dalam kereta. Yang saya nampak duit RM50.00 dilipat — semua wang RM50.00 dalam lipatan adalah wang tulen'. SP6 the investigating officer testified that SP3 told him that the photostated notes used in the 'flash roll' were about RM20,000; but SP6 said he did not see the 'flash roll'. On the other hand, SP5 testified that he received RM11,000 as 'flash roll' from SP3 before the briefing and that the 'flash roll' was a mixture of RM50 and RM100 notes.

**[25]** It was argued that the 'flash roll' was a very important part of the selling transaction. However, SP3 did not surrender the 'flash roll' to the investigating officer. The reason given by SP3 for this is that the 'flash roll' 'merupakan wang yang digunakan sepanjang masa'. On these discrepancies as to the 'flash roll' learned counsel for the first appellant submitted that the contradictions were serious and raised a doubt on the credibility of evidence as to whether there was indeed a 'a selling' transaction and the failure of SP3 to surrender the 'flash roll' to the investigating officer SP6 and non-production of the 'flash roll' as evidence compounds the weakness in the prosecution's case. Relying on *Adzhaar bin Ahmad & Anor v Public Prosecutor* [1996] 4 MLJ 85, he further submitted that any a doubt in the prosecution's case should be held in favour of the accused.

**[26]** The question is whether the discrepancies in the testimonies of the prosecution witnesses as to the 'flash roll' is so material and damaging that it shakes the prosecution case to its roots? On the face of it, we acknowledge that there are discrepancies in the prosecution's evidence as to the 'flash roll'. But then, discrepancies in the testimonies of witnesses in any given case are

something that is quite normal and acceptable within certain limits. The test as to whether a discrepancy is acceptable or not is laid down in *Andy bin Bagindah v Public Prosecutor* [2000] 3 MLJ 644; [2000] 3 CLJ 289 (CA) where in the judgment of Shaik Daud JCA, the court said that:

> there is no dearth of authorities to say in every case, there is bound to be contradictions and discrepancies. The question to be decided by the trial judge is whether those contradictions and/or discrepancies are material ones so as to strike at the very root of the charge.

**[27]** This test was applied in another Court of Appeal case of *Wan Marzuki Wan Abdullah v Public Prosecutor* [2008] MLJU 285; [2008] 4 CLJ 631. Both authorities were cited and referred to in the learned trial judge's written judgment in this case.

**[28]** We have given learned counsel arguments and submissions on this issue our utmost consideration. We are satisfied that despite the discrepancies in the prosecution's witnesses as to the 'flash roll' the fact remains that the 'flash roll' was used in the transaction by SP5. This is not contradicted in any way by the evidence adduced in the defence. This is a case in which the prosecution relied on 'agent provocateur'. In our view, therefore the use of the 'flash roll' is only as enticement to convince the seller of the drugs that the buyer has the means to pay for them. We say so because the evidence in this case is that when 'Abang Wan', the second appellant, was in the car with SP5 and SP5 told the second appellant that he wanted to see the drugs which he had wanted to buy, the second appellant had asked SP5 to see the money first. Only when SP5 had shown the 'flash roll' did the second appellant direct the first appellant to fetch the drugs. In our view therefore the discrepancies as to the 'flash roll' and the non tendering of the same in evidence does not create any reasonable doubt that a 'flash roll' was used in the transaction. We therefore agree with the finding of the trial judge that the discrepancies in the evidence as to the 'flash roll' are not material as to affect the core of the prosecution's case. We also do not agree with learned counsel for the first appellant's submissions that the learned trial judge did not address the discrepancies in the evidence of the witnesses as to the 'flash roll'. In our view, the learned trial judge had in his mind and considered the discrepancies when he wrote in his judgment as follows:

> on the defence submission of the inconsistency in the flash role between the evidence of SP3–SP6 in the amount and nature of the notes being genuine and photostat to my mind is not material as to affect the core of the prosecution's case …

**[29]** The above passage in the judgment of the learned trial judge shows that His Lordship had evaluated the evidence and its discrepancies even though His Lordship had not discussed the specifics in his judgment.

**[30]** Related to the submission on discrepancies in the evidence of the prosecution alluded to above, learned counsel for the first appellant also submitted on the credibility of the prosecution witnesses' evidence as to the 'selling transaction'. The learned trial judge had rejected the appellant's submission on this point. We are of the view that His Lordship had every reason to do so and His Lordship is right to do so. It is trite law that the trial judge is in a better and more advantageous position to assess and appraise the credibility of witnesses giving evidence before him. This is because the trial judge can see and observe the witnesses demeanour in giving evidence particularly during cross-examination by the opposing counsels. In that regard the Appellate Court ought to be slow in interfering with the finding by the trial judge as to the credibility of witnesses that have given evidence before him. Moreover, in this case the witnesses whose credibility are being challenged are police witnesses. In *Public Prosecutor v Mohamed Ali* [1962] 1 MLJ 257, where the credibility of a police witness in a road accident case was in issue, Thomson CJ, sitting on an appeal from the subordinate court, said that 'when a police witness says something that is not inherently improbable his evidence must in the first instance be accepted … Of course if his evidence is contradicted by other evidence or is shaken by cross examination then it becomes the business of the magistrate to decide whether or not it should be accepted. In the absence of contradiction, however, and in the absence of any element of inherent probability the evidence of any witness, whether a police witness or not, who gives evidence on affirmation, should normally be accepted.' In our case, though there are discrepancies in the evidence of SP3–SP6, they are not inherently improbable. The case of *Adzhaar bin Ahmad & Anor* cited by learned counsel for the first appellant to support his argument on this issue can be distinguished on the facts. In that case, the prosecution had introduced in evidence two entries in a pocket diary regarding money purportedly for the purpose of paying bail; and the court found that the entries were contradictory to each other that the sessions court which heard the case in the first instance had failed to address the contradictions.

**[31]** The second issue raised by learned counsel for the first appellant is that there is doubt as to the exhibits. The principal argument by learned counsel is that *borang serah barang-barang kes* (exh D19) was not signed by SP6, the investigating officer, when SP3 handed over the exhibits seized at the crime scene. In exh D19 the following exhibits were handed over to SP6 by SP3:

(1) Satu bag warna hitam bertanda A bertandatangan dan bertarikh 17.5.2005;

(2) Satu kotak kertas bertulis 2 tier dish rack bertanda B bertandatangan dan bertarikh 17.5.2005;

(3) 5 ketulan mampat tumbuhan kering disyakki ganja yang dibaluti plastik lutsinar dan kertas timah bertanda C1-C5 bertandatangan dan bertarikh 17.5.2005;

(4) Satu telefon bimbit jenis Motorola bertandatangan; dan

(5) Satu telefon bimbit jenis Nokia bertandatangan.

**[32]** It was submitted for the first appellant that there was a movement of the exhibits from the scene of the crime to the police station. The exhibits were then sent to the chemist on 18 May 2005 and collected by SP6 on 4 July 2005 and kept by him in his cabinet and then sent to the exhibit store on 27 July 2005. It was submitted that the failure of SP6 to sign exh D19 raises a doubt as to whether the exhibits which were seized at the scene of the offence and then moved to the chemist and returned to SP6 are the same exhibits. In this regard, learned counsel for the first appellant also raised the issue that exh P11A, the wrapper that was used to wrap the drugs had a rabbit sticker on it. But this fact was not mentioned in exh D19. Further it was submitted that the storekeeper was never called to testify as to when the exhibits were taken out from the exhibit store by SP6.

**[33]** On this issue as to a break in the chain of evidence the learned trial judge wrote in his judgment as follows:

> As regards the impugned drugs I am satisfied that there is no break in the chain of evidence. The prosecution's evidence shows that the black bag P18 and the box P8 containing the five slabs of cannabis was seized by Chief Inspector Termizi bin Omar (SP3) as the place of incident and he made marking C1 to C5 to them (exhs P11A–P15A) and handed it to the investigating officer SP6 who confirmed the markings and receipt of same and putting his signature on them. The impugned drugs after the analysis by the chemist was subsequently registered and kept with the *penjaga barang setor* which drugs was the same drugs that was brought to and identified in court.

**[34]** We do not find anything wrong with the conclusion reached by the learned trial judge as shown in the above passage from His Lordship's written judgment. We are of the view that His Lordship has appraised the evidence as to the movement of the exhibits sufficiently to be satisfied that there is no break in the chain of evidence as to the exhibits. Moreover we are of the view that the evidence of SP6 has put beyond any doubt that the exhibits particularly the impugned drugs seized by SP3 at the scene of the crime and which were marked as C1–C5 by SP3 and given to SP6 are the same drugs that were sent to the chemist SP2 for analysis and subsequently produced in court during the trial. SP6 in his evidence had testified that when he received the exhibits from SP3, he inspected them in order to mark them. He further testified that on inspection he saw the exhibits already had markings on them together with the date and signature of SP3 on them. He also testified that when he received the five slabs of cannabis from SP3, he puts his signature on each of the slabs and kept them in a locked cabinet in his office and he alone kept the key to the

cabinet. SP6 also testified that he himself had sent the drugs to the chemist for analysis and he was also the one who collected them from the chemist after the analysis was done. This evidence was corroborated by SP2, the chemist. SP6 also had identified the exhibits during the trial.

**[35]** The third issue raised by learned counsel for the first appellant is that the storekeeper S/M Abdul Rahim Abdullah was not called to testified as to when the exhibits were taken out from the store and the learned judge did not address this issue in his judgment. Thus, it was submitted there is a break in the chain of evidence. As authority for this proposition learned counsel for the first appellant cited *Public Prosecutor v Poh Ah Kwang* [2003] MLJU 186, 142; [2003] 2 CLJ 722 in which the court in that case had made reference to the Supreme Court decision in *Teoh Hoe Chye v Public ProsecutorYeap Teong Tean v Public Prosecutor* [1987] 1 MLJ 220; [1987] 1 CLJ 471 where it was held that the failure to call a particular witness in that case to establish the identity of the exhibits had caused a serious break in the chain of evidence.

**[36]** In our view, the principles laid down in the two cases cited by learned counsel for the first appellant must be applied to the particular facts of the case. In *Poh Ah Kwang* the court found there was a serious gap in the chain of handling the drugs and exhibits that were produced in court. There was an unexplained gap of two days whereof the court had not been told what happened to the drugs and the exhibits during the said period. In the words of the court in that case, 'the drugs and exhibits had just disappeared and reappeared'. In *Teoh Hoe Chye* the investigating officer who received the drugs and the exhibits from the raiding officer was never call to testify as to the exhibits. However, in our case the movement of the drugs and exhibits were reasonably explained through the evidence of the raiding officer SP3, the investigating officer SP6 and the chemist SP2. We also noted that though S/M Abdul Rahim Abdullah, the storekeeper, was not called by the prosecution to testiy, he was offered to the defence as a witness by the prosecution. However neither the first nor the second appellant took up the offer and called the storekeeper to testify.

**[37]** *Su Ah Ping v Public Prosecutor* [1980] 1 MLJ 75 (SC) is an authority for the proposition that it is unnecessary to call evidence to ensure that there is no break in the chain of evidence. And the ratio decidendi in *Teoh Hoe Chye* is that where a doubt as to the identity of exhibits arises, a failure to adduce evidence to provide the necessary link in the chain of evidence is fatal to the prosecution's case. It is trite law that in a criminal case the legal burden to prove a case beyond reasonable doubt is throughout on the prosecution. Thus, the issue in relation to whether there is a break in the chain of evidence in any given case is not whether there was a failure to call or not to call a witness but whether the failure

to call a particular witness gave rise to a serious gap in the prosecution's case: *Abdul Jalil bin Abdul Satar v Public Prosecutor* [1991] 2 MLJ 194; [1991] 2 CLJ 1099 (SC).

**[38]** On the factual matrix of our case, it is our considered view that there is no doubt as to the identity of the exhibits that were seized from the appellants by SP3 and the exhibits that were produced in court as being one and the same.

**[39]** We are of the opinion therefore that there is no merits in the first appellant's appeal.

**[40]** As for the second appellant, learned counsel in his skeletal written submission submitted that the learned judge has taken into consideration hearsay evidence by accepting the evidence of SP5 that the name Ridwan (the second appellant) and his contact number (016–6897072) and therefore has resulted in a serious misdirection on the part of the trial judge. SP5 has testified that the name Ridwan and his contact number was given by his source. It was argued that this information by SP5's source is hearsay evidence. We do not agree with this view. We are of the opinion that what was told to SP5 by his source is not hearsay. It is just information given by one party to another. The court may receive it just as that. In any event the telephone number and the name given to SP5 were not used, in our view, to identify the second appellant as claimed by learned counsel for the second appellant. SP5 testified that he used the telephone number only to make a call to arrange for a meeting where the transaction for the purchase of the drugs could be made. Arising from the call made by SP5 using the number given to him, the second appellant came and enter into a negotiation with SP5 in the latter's car in front of the Masjid Jamhuriyah.

**[41]** We observed on the evidence that the second appellant was caught seated in SP5's car with the black bag that contained the drugs on his lap when SP3 and his raiding party rushed to SP5's on receiving the pre-arranged signal from SP5. The identification of the second appellant was therefore not dependent on the telephone number and the name of the second appellant as given by SP5's source. The second appellant was identified personally by SP3 and SP5 when the second appellant was in the SP5's car. Learned counsel for the second appellant submitted that without admitting the hearsay evidence, the burden is on the prosecution to prove the identity of the owner of the telephone No 016–6897072 who allegedly negotiated the drugs transaction with SP5 through the phone. In our view, this submission by learned counsel is wrong on the facts of this case. Firstly, the negotiation between 'Abang Wan' or who later was identified as the second appellant was not conducted over the phone using the said phone number. It was conducted in SP5's car. The phone number was used by SP5 only to contact the second appellant to inform him

that SP5 had already arrived at the pre-arranged place of negotiation in front of the Masjid Jamhuriyah. Only after the phone call by SP5 did the two appellants arrive at the crime scene and approach SP5's car. When they had entered the car, then only the negotiation commenced. This narration of facts is very clear from the evidence of SP5 who testified as follows:

> Setiba di tempat kejadian saya menghubungi Ridwan menggunakan telefon bimbit.
>
> Nombor telefon Ridwan 016-6897072.
>
> Nombor telefon Ridwan diberi oleh sumber saya.
>
> Ridwan beritahu saya tunggu sekejap dia akan datang.
>
> Dua orang datang ke kereta dan membuka kedua-dua pintu belakang kereta dan masuk dalam kereta di tempat duduk belakang.
>
> Dua orang tersebut ditangkap oleh polis kemudian.
>
> Penama Ridwan masuk melalui pintu belakang kanan dan penama Zakaria masuk melalui pintu belakang kiri — kedua-dua Ridwan dan Zakaria dicam sebagai OKT1 dan OKT2.
>
> Bila mereka masuk kereta Ridwan mengenalkan dirinya dan diri Zakaria.
>
> Ridwan memberitahu 'ganja sudah ada' dan ganja berada di tempat lain dan motion urus niaga dijalankan di tempat lain.
>
> Saya bertegas dan beritahu Ridwan kalau urusan dibuat di lain tempat saya akan cancel.
>
> Ridwan kemudian bincang dengan Zakaria dalam bahawa Aceh — saya tak faham.
>
> Kemudian saya melihat Zakaria keluar dari kereta dan Ridwan beritahu Zakaria keluar untuk mengambil ganja tersebut.
>
> Selepas Zakaria keluar — saya ada bual kosong dengan Ridwan dalam kereta.
>
> Tidak lama kemudian Zakaria balik membawa 1 beg galas warna hitam dan masuk kereta melalui pintu belakang kiri.
>
> Ridwan beritahu saya ganja sudah sampai.
>
> Saya beritahu Ridwan saya hendak tengok ganja tersebut.
>
> Ridwan arahkan Zakaria menunjuk ganja tersebut Zakaria membuka zip beg galas dan mengeluarkan satu kotak dan dalam kotak Zakaria keluarkan satu ketul ganja — penama Ridwan beritahu ketulan adalah ganja.
>
> Bila Zakaria pergi mengambil ganja Ridwan beritahu dia hendak tengok duit.
>
> Saya keluarkan satu ikatan wang kertas berjumlah RM11,000.00 dari poket kanan seluar saya dan menunjukkan kepada Ridwan.
>
> Saya masukkan ikatan wang kertas dalam poket saya dan Zakaria pun sampai.

**[42]** Secondly, it is obvious on the above testimony of SP5, the first and

second appellants had approached SP5's car only after the phone call by SP5. And when they arrived, they immediately got into SP5's car. Thirdly, and as we have mentioned earlier, they were caught whilst they were still in SP5's car together with the drugs.

**[43]** Thus in our view there cannot be any mistake as to the identity of the second appellant. In this regard it is our considered view that the absence of any recording as to the seizure of the two phones from the appellants at the crime scene in the search list prepared by SP3 as submitted by learned counsel for the second appellant, is of no consequence and does not create any reasonable doubt in the prosecution case.

**[44]** The next issue submitted by learned counsel for the second appellant is that to prove trafficking under s 2 of the DDA, direct evidence must be adduced to prove that there is negotiation which leads to the production of the drugs; and to prove trafficking base on the presumption under s 37(da) mens rea possession must be proven. It was further submitted that when there is more than one mode of proving the learned trial judge must make a firm finding which mode of proving the learned trial judge is relying on and it must be made known to the appellants at the end of the prosecution's case. It was submitted for the second appellant that in this case the learned judge had relied both on direct evidence of trafficking under s 2 of the DDA and alternatively had also invoked the presumption under s 37(da) to call for the appellants to enter their defence at end of the prosecution's case. However, it was argued that the learned trial Judge had not articulated this fact at the end of the prosecution case. Thus it was submitted that the appellants were not aware whether they were required to raise a reasonable doubt in regard to direct evidence of trafficking under s 2 of the DDA or the evidential burden has shifted to them and they were required to rebut the statutory presumption under s 37(da) on the balance of probabilities. It is the submission of learned counsel for the second appellant that the learned trial judge had called for the defence based on direct evidence of trafficking under s 2; however His Lordship had convicted both appellants by invoking s 37(da) at the end of the defence's case. As such it was argued that the learned trial judge had misdirected himself in applying the burden of proof which has placed both appellants at tactical disadvantage that resulted in unfairness to the appellants and therefore the said conviction was unsafe. Learned counsel submitted in this way by relying on the following passage found in the written judgment of the learned trial judge:

> the sum total of the evidence and the conduct of both the accused also leads me to conclude that both the accused has failed on a balance of probabilities to raise any reasonable doubt or rebut as to my finding that they were in actual possession and the applicability of the presumptive of trafficking under s 37(da) of the DDA.

**[45]** We find no merits in this submission by learned counsel for the second appellant. In our view the learned trial judge may rely on direct evidence of trafficking adduced before him and in the alternative may also invoke the presumption of trafficking if the evidence warrants it in calling for the appellants to enter their defence. This issue was addressed by the Federal Court in *Public Prosecutor v Sa'ari bin Jusoh* [2007] 2 MLJ 409; [2007] 2 CLJ 197 where the court said, through the judgment of the late Augustine Paul FCJ, that a verdict can be founded on a basis not indicated by the prosecution in its opening address, but it must be done in such a way so as not to place the respondent at a tactical disadvantage with resultant unfairness to him. The determinative factor is whether the defence has had opportunity to meet the new basis of conviction.

**[46]** In the present case the prosecution is in a better position as compared to the situation in *Sa'ari Jusoh*.

**[47]** Reading the record of appeal (*Jil* 1) we noticed that in their respective submissions at the close of the prosecution's case both learned counsel for the first and second appellants had addressed the court on the direct evidence of trafficking but not on the presumption under s 37(da) of the DDA. However in the submission by the prosecution it made it very clear that the prosecution was relying on proof of possession and trafficking separately and notice of this had been given to the defence. In fact in the prosecution opening speech it was stated unequivocably that the prosecution would show evidence of actual trafficking and in the alternative if the trial court found no such evidence the prosecution would prove possession of the drugs by both appellants and their common intention to traffic in them. Accordingly, evidence was led by the prosecution in relation to direct evidence of selling and possession. Therefore in our view the appellants had had the opportunity to meet all the evidence adduced by the prosecution in this case either direct evidence of trafficking or the evidence that triggers the presumption under s 37(da) of the DDA 1952 when they were called to make their defence.

**[48]** In the circumstances, we find that the appellants were not prejudiced or put in a situation of tactical disadvantage as alleged by the learned counsel for the second appellant.

**[49]** We also rejected this submission by learned counsel for the second appellant on another ground — that is under s 180 of the Criminal Procedure Code (Revised 1999) the duty of a judge, sitting alone, at the close of the case for the prosecution, is to determine, as trier of fact, on maximum evaluation of the evidence of the prosecution whether the prosecution has made out a prima face case against the accused — *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 1 CLJ 734 (CA).

**[50]** In our view the learned trial judge is correct to conclude, on the evidence, that the transaction in this case is one of 'selling' within the definition of 'trafficking' under s 2 of the DDA. We also agreed with his reasonings culled from the grounds of judgment at pp 175–176 of the appeal record *Jil* 2 which has been referred to earlier in this judgment.

**[51]** In *Ong Ah Chuan v Public ProsecutorKoh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64, the Privy Council, in a criminal appeal from Singapore in dealing with the issue of trafficking under s 2(a) read with s 3(a) of the Singapore Misuse of Drugs Act 1973 (5 of 1973) which is in substance similar with our s 2 and s 39B(1)(a) of the DDA, held that the mere act of moving the drug from one place to another under the Act, does not of itself amount to trafficking within the meaning of the definition in s 2 of the Act; but if the purpose for which they are being moved was to transfer possession from the mover to some other person at their intended destination the mover is guilty of the offence of trafficking under s 3 of the Act, whether that purpose was achieved or not. It was also held in that case that in a case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the purpose of trafficking in them would, in the absence of any plausible explanation by him, be irresistible. And that as a matter of common sense the larger the quantity of drugs involved the stronger the inference that they were not intended for personal consumption of the person carrying them, and the more convincing the evidence needed to rebut it.

**[52]** What is important to note in the *Ong Ah Chuan*'s case is that the Privy Counsel's conclusion that if the intention of the mover under the Singapore Act is to transfer possession of the drugs to another at the place of destination is proven whether the purpose is achieved or not the mover is guilty of trafficking. In the case before us, it is clear on the evidence that the appellants intended to sell the cannabis to SP5 who had disguised as the would-be purchaser. But before the transaction could be completed ie before the money for the purchase could change hand between SP5 and the appellants the trap was sprung and the appellants arrested. So the question is does in this case the prosecution had made out a case of trafficking? This issue was settled by the Federal Court in *Sa'ari Jusoh*'s case where the court disagreed with the conclusion of the Court of Appeal in that case that to constitute 'selling' within the meaning of s 2 of the DDA there must be actual delivery of the drugs accompanied by the physical handing over of the agreed price. Instead, the Federal Court expressed the view that a sale is concluded upon transfer of the property in goods though the price had not been paid. It is also interesting to note that Justice Abdul Aziz Mohamad FCJ, who delivered the second judgment in that case, had taken the approach that in considering the meaning

of 'sell', for the purpose of determining the ordinary meaning of 'selling' in the definition of 'trafficking' in s 2 of the DDA, is to take the plain dictionary meaning of the word as found in *Webster's New World Dictionary*, (3rd Ed), which His Lordship said that that is the meaning intended by the legislature which is 'to … deliver … goods … for money' and His Lordship concluded that '[S]o long as the delivery is for money — which the delivery in this case was — as opposed to delivery as a gift or on some other basis, it is selling even though the money for which the goods are delivered has not passed to the seller'. This reasoning therefore is consistent with the holding of Privy Council in *Ong Ah Chuan* on the point of intention to traffic in dangerous drugs.

**[53]** Now, applying the above principles to the factual matrix of this case, we find no fault in the reasonings of learned trial judge as to the evidence of trafficking as alluded to above.

**[54]** It is also our judgment that the learned judge had not erred in his finding that in the alternative (meaning that if his reasoning as to the direct evidence of trafficking is found to be flawed) His Lordship found that the prosecution has proved actual possession, and by virtue of the quantity of the drugs found on the appellants, the presumption under s 37(da) is triggered.

**[55]** In this regard we will now consider the defence's case which learned counsels for the appellants submitted that the trial judge had failed to give due consideration. It is the first appellant's story that after the prayer at the mosque he met a person by the name of Abu who was at the material time holding a black bag. The second appellant then was with the first appellant. The first appellant testified on oath that Abu requested him to deliver the black bag to a friend who was in a Waja car. The first appellant said he had known Abu for about five years and that he was told by Abu that the black bag contained 'gudang garam cigarettes'. The first appellant testified that Abu told him that he (ie Abu) could not deliver the bag himself because he had to visit a friend who had been hospitalised. The first appellant also testified that he took the bag from Abu and had asked the second appellant to follow him to take the bag to the Waja car. The first appellant said when they reached the Waja car (ie the SP5's Proton Waja car) they were surrounded and the black bag was seized from them. The first appellant said he was shock when the police officer told him that the contents of the bag were 'ganja'.

**[56]** The second appellant substantially corroborated the first appellant version of the story and testified he never met Abu and when the first appellant was speaking to Abu, he was some distance away and could not hear what they were talking about.

It was submitted that the defence's story was not inherently improbable to be rejected outright and if properly considered would have created a reasonable

doubt in the prosecution's case though the defence version may not be accepted or believed. It was submitted that in order to decide whether to reject or otherwise the defence's case as to the existence of Abu, the trial judge should have applied the test laid down in *Mat v Public Prosecutor* [1963] MLJ 263 in that even if the defence's explanation is not believed or accepted but nevertheless it raises a reasonable doubt in the mind of the trial judge as to the guilt of the accused, the court should acquit. In this appeal before us, it was argued that the learned judge had erred because having rejected the existence of Abu, His Lordship nevertheless entertained a doubt on the existence of Abu by suggesting that to accept the defence version about Abu would tantamount to both the appellants being framed up by Abu; which the learned trial judge said would not be so because he found no reason for Abu to do so.

**[57]** In dealing with the defence's version of the story the learned judge wrote in his judgment as follows:

> At the defence stage the court has to embark upon a close scrutiny of the totality of the evidence adduced.
>
> It is imperative to scrutinise the defence evidence to determine the probability or improbability of the defence version.
>
> The defence of both the accused which was given under oath merits serious consideration and particularly whether the character named Abu exist and was not a figment of both the accused's imagination conjured to escape the charge.
>
> In analysing the defence I am not oblivious that both the accused need not factually prove that Abu did exist — only the probability that he exists is sufficient. If they succeed in persuading the trial judge of the probability of the existence of Abu then on a balance of probability the incriminating drugs could have been Abu's which could exculpate them.
>
> Upon evaluating the defence of both the accused though the issue of Abu was brought up and suggested to both SP4 and SP5 in cross-examination nevertheless it was not pursued nor was there any mention of Abu in the cross-examination of the investigating officer SP6. Furthermore there was no challenge whatsoever made to SP5 of any mention of Abu in the negotiation through the mobile telephone with the second accused. In short it is my finding that Abu was never a character involved in the sale transaction — it is to my mind a character which was concocted by the defence and does not exist. Hence the defence of innocent carrier must fail. The defence has failed to raise any doubt in my mind as to the concluded sale transaction.

**[58]** And with regard to the learned judge rejection of any suggestion of framed up by Abu His Lordship wrote as follows:

> Even if the character Abu exists it does not create a reasonable doubt in the defence case. This is because the accused version would tantamount to both the accused being framed-up by Abu. For the accused version to be probable it would be

predicted by a frame-up of both accused by Abu. My evaluation of the evidence leads me to conclude that there is no reason whatsoever for a frame-up to be committed by Abu against both accused. The accused's testimony itself demolishes any frame-up. Abu vis-a-vis the first accused was a fellow countryman and friend whom first accused had known for five years whilst the second accused did not know Abu altogether. There is no evidence whatsoever of any animosity between Abu and both the accused particularly the first accused.

**[59]** In our opinion, the learned judge in the two passages in his judgment quoted above has scrutinised the defence's version with great care and in the totality of the evidence adduced before him. His Lordship not only addressed the facts of the defence's case, but also keeping in mind the evidential burden which the appellants had to discharge in order to create a reasonable doubt in the prosecution's case. Yet at the end of it all the learned judge was satisfied that on the balance of probabilities the appellants had failed to create any doubt on the prosecution's case. We are in complete agreement with His Lordship findings and conclusion.

**[60]** The final result therefore we find no merits in these two appeals. Accordingly, these appeals are dismissed and we affirmed the conviction and the sentence imposed by the learned High Court trial judge on both the first and the second appellants.

*Appeals dismissed and conviction and sentence affirmed.*

Reported by Kanesh Sundrum